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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

PETER MANUEL LOPEZ,

Defendant and Appellant.

G056130

(Super. Ct. No. 16NF0076)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Cheryl L. Leininger, Judge. Affirmed and remanded with directions. Request for Judicial Notice. Granted.

Linnéa M. Johnson, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant  
Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and  
Amanda Lloyd, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Defendant Peter Manuel Lopez appeals from the judgment of conviction entered after a jury found him guilty of one count of battery causing serious bodily injury and one count of aggravated assault with a deadly weapon; the jury also found Lopez inflicted great bodily injury in the commission of the latter offense. Lopez admitted he suffered a prior serious felony conviction. The trial court, stating its intent to impose the minimum possible sentence, imposed the two-year low term for the aggravated assault offense, stayed execution of sentence on the battery offense pursuant to Penal Code section 654,<sup>1</sup> and imposed the mandatory five-year term for the prior serious felony conviction, for a total prison term of seven years.

We affirm the judgment of conviction and remand for resentencing with directions. Sufficient evidence supported the judgment of conviction, including the conviction for battery causing serious bodily injury and the finding Lopez inflicted great bodily injury in the commission of the aggravated assault offense.

During the pendency of this appeal, Senate Bill No. 1393 (Stats. 2018, ch. 1013) (S.B. 1393) became effective January 1, 2019, thereby amending sections 667, subdivision (a) and 1385, subdivision (b) to vest in the trial court discretion to strike the five-year prior serious felony conviction enhancement under section 667, subdivision (a)(1). Lopez and the Attorney General both agree this statutory change applies to Lopez as this case is not yet final. On remand, the trial court shall hold a resentencing hearing with the limited purpose of exercising its discretion whether to strike Lopez's prior serious felony conviction and thereafter issue an amended abstract of judgment. As pointed out by both parties, the current abstract of judgment incorrectly reflects the sentence that was orally pronounced by the trial court; the trial court imposed a total prison term of seven years and not 12 years as stated in the current abstract of judgment.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

Therefore, following resentencing, the amended abstract of judgment shall be rendered to accurately reflect the trial court's sentence.

### FACTS

At 10:00 p.m. on July 19, 2015, 26-year-old Jose Gutierrez went to a liquor store in Anaheim. Gutierrez had worked late that evening and was on his way to his sister's baby shower. He parked his car and as he walked into the store, he noticed a man he had never seen before, later identified as Jose Gonzalez, standing by a Nissan and "looking" at Gutierrez. Gutierrez entered the store but shortly thereafter walked out to get some change out of his car. He saw Gonzalez, who smelled of alcohol and appeared "buzzed," still standing by the Nissan; Gutierrez reentered the store.

After Gutierrez left the store and walked to the driver's side of his car, Gonzalez suddenly got out of the backseat of the Nissan and approached Gutierrez. Gutierrez had a feeling Gonzalez was "going to bang on [him]" because of "the way" Gonzalez was approaching him. Gonzalez asked Gutierrez, "Where are you from?"<sup>2</sup> Gonzalez was familiar with criminal street gangs in the area, although he was not a member of one himself, and responded that he was from "nowhere," to communicate that he did not claim a gang and was not a gang member. When Gonzalez asked Gutierrez if he "was sure," Gutierrez responded he was sure. Gonzalez stated that Gutierrez looked like he was from somewhere and Gutierrez told him "you're mistaking me, man." Gonzalez told Gutierrez that he was from "T.C." which refers to the criminal street gang Anaheim Travelers City which claimed the area where the liquor store was located.<sup>3</sup>

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<sup>2</sup> Detective Jonathan McClintock of the Anaheim Police Department testified about the nature of a "hit-up" as a challenge asking the targeted person to disclose his or her gang affiliation. McClintock testified hit-ups often result in violence depending on the target's response.

<sup>3</sup> Lopez testified that Gonzalez is "with" Anaheim Travelers City.

After standing next to Gutierrez for 5 to 10 minutes, Gonzalez walked away and Gutierrez started talking to his friend Alex who he had run into inside the store.

Gutierrez saw Lopez emerge from the Nissan through the driver's door and approach Gutierrez aggressively, asking Gutierrez if he was going to "shut the fuck up." Gutierrez had seen Lopez inside the liquor store but they did not communicate and Gutierrez had never seen him before that night. Gutierrez told Lopez he was not going to "shut the fuck up." Lopez struck Gutierrez on the head with a flashlight Lopez was holding. Gutierrez asked Lopez why he hit him and Lopez "just grinned." Gutierrez, who was bleeding significantly, punched Lopez in the face and the two men fought. At some point, a young woman, later identified as Gonzalez's daughter, emerged from the front passenger seat of the Nissan and began recording the incident. Gutierrez heard the young woman say "stop, stop, stop." Gutierrez saw Gonzalez hold back Alex and another friend of Gutierrez's.

After the fight ended, Lopez and Gonzalez drove away in the Nissan; Gutierrez yelled profanities at them as they left and then went inside the store to get napkins for his face and eyes because he was "gushing bleeding."

Gutierrez went to the hospital emergency room where he received six staples to close the two-inch long laceration caused by Lopez striking him with the flashlight. Gutierrez later had to have the staples removed and he has a slight scar from that injury.

Lopez testified that he struck Gutierrez in self-defense. He explained that Gonzalez was Lopez's brother-in-law and when Gonzalez suddenly got out of the Nissan and confronted Gutierrez, Lopez observed Gutierrez as appearing aggressive and angry. When Lopez noticed Gutierrez's friends in the area and feared Gonzalez was getting surrounded, Lopez got out of the car to "stop everything." He was worried about Gonzalez getting hurt and he grabbed the flashlight he used at work "for protection." He testified he approached Gutierrez and asked what was going on (he denied telling

Gutierrez to “shut the fuck up”) when Gutierrez hit Lopez first. Lopez testified “out of a reaction” he swung at Gutierrez with the flashlight.

### PROCEDURAL HISTORY

Lopez was charged in an information with one count of aggravated assault in violation of section 245, subdivision (a)(1) (count 1) and battery causing serious bodily injury in violation of section 243, subdivision (d) (count 2). As to count 1, the information alleged, pursuant to section 12022.7, subdivision (a), and within the meaning of sections 1192.7 and 667.5, Lopez personally inflicted great bodily injury in the commission of that offense. The information further alleged, pursuant to sections 667, subdivisions (d) and (e)(2)(A) and 1170.12, subdivisions (b) and (c)(2)(A), that Lopez had suffered at least two prior serious and/or violent felony convictions and, pursuant to section 667, subdivision (a)(1), he had previously been convicted of a serious felony listed in section 1192.7.

Before the jury trial, Lopez filed a motion in limine seeking to exclude gang testimony. The trial court denied the motion. At trial, the court allowed the prosecution to introduce limited gang evidence, including evidence Gonzalez initiated the gang hit-up and claimed membership in the Anaheim Travelers City gang, as well as McClintock’s testimony explaining gang hit-ups and that the charged offenses occurred in Anaheim Travelers City criminal street gang’s claimed territory.

The jury found Lopez guilty on both counts and found the great bodily injury enhancement allegation on count 1 true. Lopez admitted the prior conviction and the prior serious felony conviction allegations. The trial court sentenced Lopez to a total prison term of seven years by imposing the low term of two years on count 1, a two-year term on count 2, execution of which the court stayed pursuant to section 654, and a five-year consecutive term for the prior serious felony enhancement pursuant to section 667, subdivision (a)(1). Lopez appealed.

## REQUEST FOR JUDICIAL NOTICE

Lopez has filed a motion for judicial notice requesting that, pursuant to rule 8.252 of the California Rules of Court and Evidence Code sections 452 and 459, this court take judicial notice of legislative history of S.B. 1393 which became effective January 1, 2019 and amended sections 667, subdivision (a) and 1385, subdivision (b). The Attorney General has not filed an opposition to Lopez's request. Lopez's request is granted.

## DISCUSSION

### I.

#### SUBSTANTIAL EVIDENCE SUPPORTED LOPEZ'S CONVICTION FOR BATTERY CAUSING SERIOUS BODILY INJURY AND THE FINDING HE INFLICTED GREAT BODILY INJURY IN COMMITTING THE AGGRAVATED ASSAULT.

In his opening brief, Lopez argues insufficient evidence shows the injuries Gutierrez suffered constituted either "serious bodily injury" to support his battery conviction under section 243, subdivision (d) or "great bodily injury" to support the true finding on the aggravated assault section 12022.7, subdivision (a) enhancement. Lopez's arguments are without merit.

### A.

#### *Standard of Review*

"When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] . . . We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also

reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness's credibility." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

B.

*Substantial Evidence Showed Lopez Caused Injury Constituting "Serious Bodily Injury" Within the Meaning of Section 243 and "Great Bodily Injury" Within the Meaning of Section 12022.7.*

In count 2, Lopez was charged with battery in violation of section 243, subdivision (d) which provides: "When a battery is committed against any person and serious bodily injury is inflicted on the person, the battery is punishable by imprisonment in a county jail not exceeding one year or imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years." Subdivision (f)(4) of section 243 provides: "'Serious bodily injury' means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; *a wound requiring extensive suturing*; and serious disfigurement." (Italics added.)

The jury also found, that in the commission of the aggravated assault offense charged as count 1, Lopez inflicted great bodily injury on Gutierrez within the meaning of section 12022.7. Subdivision (f) of section 12022.7 provides: "As used in this section, 'great bodily injury' means a significant or substantial physical injury."

"California courts have long held that 'serious bodily injury,' as used in section 243, and 'great bodily injury,' as used in section 12022.7, are essentially equivalent." (*People v. Johnson* (2016) 244 Cal.App.4th 384, 391; see *People v. Santana* (2013) 56 Cal.4th 999, 1008 ["We recognize that the terms 'serious bodily injury' and 'great bodily injury' have been described as . . . having 'substantially the same meaning'"]; *People v. Sloan* (2007) 42 Cal.4th 110, 117 [same].)

Here, substantial evidence supported the findings that Lopez inflicted "serious bodily injury" on Gutierrez within the meaning of section 243, subdivisions (d)

and (f)(4) and personally inflicted “great bodily injury” on Gutierrez within the meaning of section 12022.7, subdivision (f) in the commission of the aggravated assault offense. The evidence shows Lopez struck Gutierrez on the head with a 12- or 18-inch long flashlight, causing a two-inch laceration that required six staples to close. The staples had to be removed at a later time and a slight scar remains at the laceration site.

In his opening brief, Lopez argues “[s]ix sutures, without more, is not extensive suturing for purposes of serious bodily injury.” Lopez does not cite any legal authority establishing the insufficiency of six sutures to establish great bodily injury or serious bodily injury. ““A fine line can divide an injury from being significant or substantial from an injury that does not quite meet the description.”” [Citations.] Where to draw that line is for the jury to decide.” (*People v. Cross* (2008) 45 Cal.4th 58, 64.) Here, we cannot conclude, as a matter of law that the laceration Gutierrez suffered on his head did not constitute a “serious impairment of physical condition” (§ 243, subd. (f)(4)) or a “significant or substantial physical injury” (§ 12022.7, subd. (f)).

In his opening brief, Lopez challenges the jury’s findings on this issue by stating: “There was absolutely no expert medical evidence to support the claim.” No such evidence, however, was required to establish great bodily injury or serious bodily injury. Not even nonexpert evidence of medical treatment is required, as explained in *People v. Wade* (2012) 204 Cal.App.4th 1142, 1149-1150: “Although any medical treatment obtained by the victim is relevant to determining the existence of ‘great bodily injury’ [citation], the statutory definition . . . do[es] not *require* a showing of necessity of medical treatment. Nor are we aware of any case authority imposing such a requirement. Accordingly, our construction of ‘serious bodily injury’ is consistent with the definition of ‘great bodily injury.’”

In any event, nonexpert evidence of medical treatment was presented at trial in the form of Lopez’s testimony about the medical treatment he received (e.g. drove himself to the emergency room and received medical treatment including six staples) and

a photograph (admitted into evidence as the People’s exhibit No. 2), which Anaheim Police Officer Brett Klevos testified accurately depicted the appearance of Lopez’s laceration and staples at the hospital.

## II.

### THE TRIAL COURT DID NOT ABUSE ITS DISCRETION UNDER EVIDENCE CODE SECTION 352 BY ADMITTING LIMITED GANG EVIDENCE.

Lopez argues the admission of gang evidence at trial was unduly prejudicial under Evidence Code section 352 and therefore should have been excluded. The trial court allowed the prosecution to present evidence showing Gonzalez was a member of Anaheim Travelers City criminal street gang, the liquor store was located in Anaheim Travelers City’s claimed territory, and the nature of a “hit-up” in criminal street gang culture.

Evidence Code section 352 allows for the exclusion of evidence “if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” A trial court’s decision to admit or exclude evidence pursuant to Evidence Code section 352 is reviewed for abuse of discretion. (*People v. Thomas* (2011) 51 Cal.4th 449, 485.)

Although trial courts “should carefully scrutinize” gang evidence before admitting it, a trial court may reasonably conclude under Evidence Code section 352 that the probative value of the evidence of gang membership is not substantially outweighed by its prejudicial effect. (*People v. Champion* (1995) 9 Cal.4th 879, 922-923.) Here, the gang evidence was highly probative to explain Gonzalez’s aggressive behavior toward Gutierrez, which led to the commission of Lopez’s aggravated assault and battery against Gutierrez. The gang evidence was limited; McClintock’s testimony regarding gang affiliation and hit-ups is contained in fewer than 20 pages of the reporter’s transcript. The evidence did not show Lopez had any gang affiliation except that he was related to

Gonzalez, who is his brother-in-law and a member of Anaheim Travelers City. Because the gang evidence provided context for Gonzalez's conduct and did not relate to Lopez (no evidence was presented Lopez had any gang affiliation), its prejudicial impact was limited. We cannot conclude the trial court abused its discretion under section 352 of the Evidence Code by allowing the limited gang evidence admitted in this case.<sup>4</sup>

### III.

#### WE REMAND FOR RESENTENCING AS TO THE PRIOR SERIOUS FELONY CONVICTION ENHANCEMENT PURSUANT TO AMENDED SECTIONS 667, SUBDIVISION (a)(1) AND 1385, SUBDIVISION (b).

In supplemental briefing, Lopez contends S.B. 1393 applies retroactively to vest in the trial court discretion to strike section 667, subdivision (a)(1)'s five-year enhancement for Lopez's prior serious felony conviction (§ 1385, subd. (b)) and that this court should remand for resentencing on that issue. "On September 30, 2018, the Governor signed [S.B.] 1393 which, effective January 1, 2019, amends sections 667[, subdivision] (a) and 1385[, subdivision] (b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. [Citation.]" (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) Under the prior versions of these

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<sup>4</sup> At oral argument and in the appellate reply brief, Lopez's appellate counsel argued the trial court's erroneous admission of the limited gang evidence at trial violated Lopez's right to due process and "rendered the entire trial fundamentally unfair." In his opening appellate brief, Lopez's constitutional challenge with regard to the admission of that evidence was entirely based on the argument the trial court erred by failing to exclude the evidence under Evidence Code section 352. As we found no abuse of discretion in violation of Evidence Code section 352, Lopez's constitutional argument based on that alleged error necessarily fails. To the extent Lopez argues that, notwithstanding the absence of such an abuse of discretion, the admission of the limited gang evidence violated his constitutional rights, we reject that argument. The majority opinion in *People v. Albarran* (2007) 149 Cal.App.4th 214, on which Lopez relies, is distinguishable. The limited gang evidence presented at trial gave context to Gonzalez's actions. Unlike the procedural and factual circumstances in *People v. Albarran*, the limited gang evidence here was neither irrelevant nor inflammatory and its admission did not violate Lopez's constitutional rights. The trial was not fundamentally unfair.

statutes, which were in effect at the time Lopez was originally sentenced, the court was *required* to impose a five-year consecutive term for “‘any person convicted of a serious felony who previously has been convicted of a serious felony’ (former § 667[, subd.] (a)), and the court had no discretion ‘to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667’ (former § 1385[, subd.] (b)).” (*Ibid.*)

The appellate court in *People v. Garcia* concluded “it is appropriate to infer, as a matter of statutory construction, that the Legislature intended [S.B.] 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when [S.B.] 1393 becomes effective on January 1, 2019. [Citations.]” (*People v. Garcia, supra*, 28 Cal.App.5th at p. 973, relying on *In re Estrada* (1965) 63 Cal.2d 740, 744-745, & *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 307-308 & fn. 5; see *People v. Rocha* (2019) 32 Cal.App.5th 352, 360; *People v. Jones* (2019) 32 Cal.App.5th 267, 272 [“When it enacted Senate Bill 1393, the Legislature did not indicate it intended the legislation to apply prospectively only. [Citations.] The act thus applies retroactively to this case”]; *People v. Pride* (2019) 31 Cal.App.5th 133, 142.).)

The Attorney General concedes the new law applies to Lopez retroactively. At the original sentencing hearing, the court expressed its intent to impose the lowest sentence possible on Lopez. We therefore remand for the limited purpose of allowing the trial court to exercise its discretion whether to strike the prior serious felony conviction enhancement and, if so, to resentence Lopez accordingly.

#### IV.

##### THE ABSTRACT OF JUDGMENT MUST BE AMENDED.

In his opening brief, Lopez argues the current abstract of judgment inaccurately states the sentence orally pronounced by the trial court at his sentencing hearing. At the sentencing hearing, the trial court sentenced Lopez to a total prison sentence of seven years by imposing the lower term of two years for the assault

conviction, the two-year term for the battery conviction (execution of which was stayed under section 654), and the consecutive five-year term mandated under section 667, subdivision (a) for Lopez's prior serious felony conviction. The trial court struck the section 12022.7 great bodily injury enhancement and the other strike priors under section 1385, subdivision (b) for the purpose of sentencing. Nevertheless, Lopez points out the current abstract of judgment incorrectly states the trial court imposed the lower term of *seven years* for the assault conviction, and imposed a total prison term of 12 years.<sup>5</sup> Noting that "[w]here there is a conflict between the trial judge's oral imposition of judgment and the [abstract of judgment], the oral imposition controls (*People v. Delgado* (2008) 43 Cal.4th 1059, 1070)," Lopez urges correction of the abstract of judgment to conform to the oral pronouncement of judgment.

The Attorney General agrees the trial court should be directed to prepare a corrected abstract of judgment showing the lower term imposed on the assault conviction to be two years, not seven years, for a total sentence of seven years, not 12 years.

It is "important that courts correct errors and omissions in abstracts of judgment." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185,) A reviewing court may correct clerical errors at any time, sua sponte or at the request of a party. (*Ibid.*) For the reasons discussed *ante*, we remand this matter with directions that the trial court exercise its discretion regarding whether to strike the prior serious felony conviction enhancement. Following the court's hearing, regardless of the result, the trial court shall issue an

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<sup>5</sup> We draw to the trial court's attention the same error in the abstract of judgment stating the court imposed a seven-year term on count 1 also appears in the court's minutes. In addition, the court's minutes recording the jury's verdicts do not accurately record the jury's true finding as to the section 12022.7 enhancement set forth in the verdict form returned by the jury. Instead, the minutes initially reflect that *the court* found the section 12022.7, subdivision (a) enhancement *not* true. A separate entry states that the finding for the section 12022.7 enhancement was entered in error. A subsequent entry states that *the court* found beyond a reasonable doubt the section 12022.7, subdivision (a) enhancement true.

amended abstract of judgment which correctly states the two-year prison sentence imposed by the trial court on the assault offense.

#### DISPOSITION

The judgment of conviction is affirmed but Lopez's sentence is vacated and the matter is remanded for resentencing with directions to the trial court to decide whether it will exercise its discretion to strike the prior serious felony conviction enhancement under section 667, subdivision (a). Following the resentencing hearing, regardless of whether the court elects to strike the prior serious felony conviction enhancement, the trial court shall prepare and issue an amended abstract of judgment that addresses the error with regard to the two-year low term imposed by the trial court on count 1. The trial court shall thereafter forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.